STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001B096

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SARAH A. COVINGTON,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
COLRADO STUDENT LOAN PROGRAM,

Respondent.

This matter was heard on August 22, 2001, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Andrew M. Katarikawe, Assistant Attorney General. Complainant appeared in-person and was represented by Nora V. Kelly, Attorney at Law.

Respondent called the following witnesses: Connie Butler, Accounting Technician IV; Charles Heim, Associate Director of Legal Affairs for the Student Loan Division of the Department of Education; and Tom Kingsolver, Assistant Manager of Accounting, Colorado Student Loan Program.

Complainant testified in her own behalf and called Rosalva Vasquez, former Accounting Technician III, Colorado Student Loan Program.

Respondent's Exhibits 1 and 2 were stipulated into evidence. Exhibits 4, 5, 6 and 7 were admitted over objection. Exhibit 3 was excluded.

Complainant's Exhibits A, B, E, H, K, L, M, N and O were admitted without objection. Exhibit F was admitted over objection.

MATTER APPEALED

Complainant appeals the disciplinary termination of her employment on March 13, 2001. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of available alternatives;
3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Per complainant's request, an order sequestering the witnesses was entered, with the exceptions of complainant and respondent's advisory witness, Charles Heim, the appointing authority for this action.

FINDINGS OF FACT

The Administrative Law Judge (ALJ) considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Sarah A. Covington, began employment with the Colorado Student Loan Program (CSLP) as an Accounting Technician I in May 1989. Her position was reallocated to Accounting Technician II in January 2001.

2. Connie Butler, as supervisor of the Accounts Payable/Payroll section, became complainant's supervisor on September 8, 1998. Butler's direct supervisor, and complainant's second-level supervisor, was Tom Kingsolver, Assistant Manager of Accounting.

3. On February 27, 2001, Kingsolver gave Butler written documentation (Exh. A) for complainant to process a rush payment voucher to the U.S. Department of Education. It was complainant's responsibility to process rush payment vouchers. Butler handed the documentation to complainant and instructed her to process the payment voucher. Later, complainant went to Butler and stated that she was uncomfortable processing the voucher because it did not have a signed memo of purchase authorization. Butler then checked with Kingsolver, who said that a memo was not necessary and complainant had all the information she needed and should process the voucher. There was no CSLP policy dictating that a memo accompany a rush payment.

4. Butler conveyed Kingsolver's response to complainant, who replied that she still felt uncomfortable with it. Complainant told Butler that Butler could process the voucher, but she, complainant, would not. Butler told complainant that her refusal to do what she was told would probably cause problems for herself, and then Butler went ahead and processed the voucher so it would go out overnight, as was required for rush vouchers.

5. On February 28, in accord with CSLP policy on disciplinary actions, Butler sent a request for disciplinary action to Robert Fomer, Director of the Colorado Student Loan Program. The request described the incident of the previous day, alleging that complainant had been

insubordinate and pointing out that this was Butler's seventh request for disciplinary action against complainant. (Exh. 2.)

6. Butler had issued a corrective action to complainant for rude behavior and insubordination on December 29, 1998 (Exh. 7), and a corrective action for rude behavior, poor customer service, and not following her directives on March 11, 1999. (Exh. 6.)

7. Butler had made six requests for disciplinary action against complainant in 1999, based upon disrespect and insubordination. On April 27, 1999, in consideration of four separate disciplinary action requests, complainant received a one-month disciplinary suspension, which was upheld on appeal. (Exh. 5.) On August 10, 1999, she received a five-day suspension, which she did not appeal. (Exh. 4.)

8. Overall, Butler found complainant resistant to authority and insistent upon performing her duties without supervisory instruction.

9. Upon receipt of the February 28, 2001 request for disciplinary action against complainant, concerning the February 27 incident, Director Fomer referred the matter to Charles Heim, Associate Director for Legal Affairs, who was the delegated appointing authority for disciplinary actions. Following an R-6-10 meeting, Heim determined that the allegations were true, and that discipline was warranted.

10. In determining the appropriate discipline, Heim considered complainant's personnel record, which included: a) poor performance evaluation ratings in the areas of Communications and Interpersonal Relations from 1989 to 1995 and in 1999; b) two corrective actions in 1990; c) a corrective action in 1998 and one in 1999; d) two disciplinary actions in 1991; and e) two disciplinary actions in 1999.

Finding that all of these actions contained the common threads of rude behavior and insubordinate conduct, Heim concluded that termination was the appropriate discipline because, "everything else had been tried and did not work."

11. By a five-page letter dated March 13, 2001, the appointing authority terminated the employment of Sarah Covington for continued "insubordinate, rude, hostile and disrespectful behavior…." (Exh. 1.)

12. Rosalva Vasquez, who supervised complainant from 1990 to 1997, testified at hearing that she would not have asked complainant to process this particular voucher because it did not contain a proper signature authorizing payment, but rather, she would have gone back to Kingsolver, who could approve it, and asked him for an e-mail with his initials written on it as documentation that he had authorized it.

13. On March 15, 2001, complainant Sarah A. Covington filed a timely appeal of the disciplinary termination of her employment.

DISCUSSION

In a disciplinary proceeding, the burden of proof by a preponderance of the evidence rests with the respondent to show that there was just cause for the discipline imposed, in this case termination of employment. *See Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. In determining whether the agency's decision was arbitrary or capricious, it must be determined whether a reasonable person, upon consideration of the entire record, would honestly and fairly be

compelled to reach a different conclusion; if not, the agency did not abuse its discretion. *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999).

If there is conflicting testimony, the credibility of witnesses, as well as the weight to be given their testimony, is within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). *See Barrett v. University of Colorado*, 851 P. 2d 258, 261 (Colo. App. 1993). It is for the ALJ to resolve conflicts in the testimony. *See Mellow Yellow Taxi Co. v. Public Utilities Commission*, 644 P.2d 18 (Colo. 1982). It is for the ALJ, as the finder of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Complainant Covington does not characterize her conduct as a "refusal" to follow a supervisory order. In her mind, she was simply telling her supervisor that she felt uncomfortable processing the rush payment voucher without a written memo attached to it, contending that she was following the procedures she had been taught. She argues that termination was unwarranted because it had been one and one-half years since her last disciplinary action, and her former supervisor backed her up by testifying that the payment voucher (Exh. A) should not have been processed in the form that it was given to her.

Insubordination is, "[a] willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment." *Black's Law Dictionary* at 802 (7th ed. 1999). That is what happened here. Complainant made it clear that she was not going to process the payment voucher, thus violating a directive from her immediate supervisor and indirectly from her second-line supervisor. She does not assert that she was being instructed to perform an illegal act or an act in contravention of public policy. She does not contend that either Butler or Kingsolver lacked the authority to give her

a directive. Rather, her contention is that her supervisor's instruction violated procedures, as she knew them, and consequently she would not process the voucher, even though Butler had conveyed complainant's concern to Kingsolver and Kingsolver reiterated that the information on the document was sufficient to process the voucher. Under these circumstances, she was required to perform the work. If she felt a need to protect herself, she might have provided a writing to the effect that even though she would comply with the instruction she did not agree with it, or she could have filed a grievance afterwards. What she could not do is refuse to follow a lawful order.

Complainant is not helped by the opinion of her former supervisor. Even though that supervisor may not have instructed her to process the rush payment voucher, this supervisor did. The issue is not whether the supervisor was right or wrong. It is not a defense for an employee to refuse to comply with an order because she disagrees with it. There are other avenues, as stated above.

If the incident of February 27, 2001, were a first-time occurrence, a corrective action may have been appropriate. However, complainant had a long history of corrective and disciplinary actions for similar conduct. She had sufficient notice.

Respondent correctly argues that because complainant had all the information she needed to process the voucher but refused to do so, and given a history of insubordinate conduct, the appointing authority acted appropriately in terminating her employment. Substantial evidence sustains the findings and conclusions of the appointing authority. Respondent satisfied its burden under *Kinchen, supra.*

An abuse of discretion by an administrative agency "means that the decision under review is not reasonably supported by any competent evidence in the record." *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1999). There was no agency abuse of discretion here. The action of the respondent was not arbitrary,

capricious or contrary to rule or law. *See Wildwood Child & Adult Care Program, Inc., supra*.

Neither party is entitled to an award of attorney fees and costs pursuant to C.R.S. §24-50-125.5 and Board Rule R-8-38, which require certain findings which cannot be made in this case.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the range of alternatives available to the appointing authority.

3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ___ day
of September, 2001, at
Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of September, 2001, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly
Attorney at Law
1776 Lincoln Street, Suite 1014
Denver, CO 80203

And through interagency mail:

Andrew M. Katarikawe
Assistant Attorney General
Consumer Protection Section
1525 Sherman Street, 5th Floor
Denver, CO 80203